eme Court, U.S.
FILED

No. 10- 10-88

JUL 13 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GEOGRAPHIC EXPEDITIONS, INC.,

Petitioner,

v.

ELENA LHOTKA,
Individually and as Executor, etc., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT,
DIVISION THREE

PETITION FOR A WRIT OF CERTIORARI

J. RANDOLPH EVANS
SHARI L. KLEVENS
McKENNA, LONG
& ALDRIDGE LLP
1900 K Street, NW
Washington, D.C. 20006
(202) 496-7500

RODNEY E. GOULD
Counsel of Record
RUBIN, HAY & GOULD, P.C.
205 Newbury Street
P.O. Box 786
Framingham, MA 07101
(508) 875-5222
rgould@rhglaw.com

Counsel for Petitioner

230921

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, in concluding that the arbitration clause in the parties' contract was unconscionable, the California Court of Appeal violated Section 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA), by applying a different standard than the one used in other non-arbitration related provisions of consumer recreational contracts, thus singling out arbitration provisions for different treatment.

2. Whether, in concluding that the arbitration clause was unenforceable, the California Court of Appeal violated the mandates of the FAA by failing to allow the arbitrator to determine the enforceability of the trip participant contract as a whole.

LIST OF PARTIES

The parties in the appeal before the California Court of Appeal were Geographic Expeditions, Inc., which was the defendant and appellant in the California Court of Appeal, and the Estate of Jason Lhotka, by Elena Lhotka, Executrix, Elena Lhotka, Nicholas Lhotka, by his Guardian Ad Litem, Elena Lhotka, and Sandra Menefee, who were the plaintiffs and respondents in the California Court of Appeal.

CORPORATE DISCLOSURE STATEMENT

Innerasia Travel Group, Inc. owns 100% of the stock of the petitioner Geographic Expeditions, Inc. No publicly held company owns ten percent or more of the stock of Geographic Expeditions, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
1. The Case Below	2
2. Parallel Litigation in Federal Court	6
Reasons for Granting the Petition	7
1. The Court of Appeal treated an arbitration provision in a recreational contract differently than California law treats other provisions in recreational contracts, thereby violating the mandate of the FAA.	8

Contents

Page

2. The Court of Appeal violated the FAA by improperly failing to allow the arbitrator to determine the enforceability of the trip participant contract as a whole. 13

Conclusion 16

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Appeal Of California, First Appellate District, Division Three Filed January 29, 2010 ..... 1a

Appendix B — Order Denying Defendant Geographic Expeditions, Inc.'s Motion To Dismiss Or, In The Alternative, To Stay Action And Compel Arbitration Filed December 10, 2008 ..... 17a

Appendix C — Order Of The Supreme Court Of California Denying Petition For Rehearing Filed April 14, 2010 ..... 22a

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 14

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 9

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280 (2005) 8

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 7, 13

Perry v. Thomas,
482 U.S. 483 (1987) 9

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 15

Rent-A-Center, West, Inc. v. Jackson,
___ U.S. ___, No. 09-497,
2010 U.S. LEXIS 4981 (June 21, 2010) ... 9, 13, 14

Southland Corp. v. Keating,
465 U.S. 1 (1984) 7

Cited Authorities

Page

Geographic Expeditions, Inc. v. Estate of Lhotka, No. C 08-04624 SI, 2008 U.S. Dist. LEXIS 105691 (N.D. Cal. Dec. 29, 2008), *rev'd*, *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102 (9th Cir. 2010) 6

Securities Industries Assoc. v. Connelly, 883 F.2d 1114 (1st Cir. 1989) 13

State Cases

Allan v. Snow Summit, Inc., 51 Cal. App. 4th 1358, 59 Cal. Rptr. 2d 813 (4th Dist. 1996) 11

Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745 (2000) ... 4-5, 9

Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 60 Cal. Rptr. 3d 631 (1st Dist. 2007) 10

Blue Booth v. Santa Barbara Biplane Tours, LLC, 158 Cal. App. 4th 1173, 70 Cal. Rptr. 3d 660 (2nd Dist. 2008) 11

Crippen v. Central Valley RV Outlet, Inc., 124 Cal. App. 4th 1159, 22 Cal. Rptr. 3d 189 (2004) 9-10

Cited Authorities

Page

Hulsey v. Elsinore Parachute Center,
168 Cal. App. 3d 333,
214 Cal. Rptr. 194 (4th Dist. 1985) 12

Kurashige v. Indian Dunes, Inc.,
200 Cal. App. 3d 606,
246 Cal. Rptr. 310 (2nd Dist. 1988) 11

Little v. Auto Stiegler, Inc.,
29 Cal. 4th 1064,
130 Cal. Rptr. 2d 892 (2003) 9

Madison v. Superior Court,
203 Cal. App. 3d 589,
250 Cal. Rptr. 299 (2nd Dist. 1988) 11

Okura v. United States Cycling Federation,
186 Cal. App. 3d 1462,
231 Cal. Rptr. 429 (2nd Dist. 1986) 11

Olsen v. Breeze, Inc.,
48 Cal. App. 4th 608,
55 Cal. Rptr. 2d 818 (1996) 10, 11

Platzer v. Mammoth Mountain Ski Area,
104 Cal. App. 4th 1253,
128 Cal. Rptr. 2d 885 (3rd Dist. 2002) 12

Cited Authorities

Page

Randas v. YMCA of Metropolitan Los Angeles,
17 Cal. App. 4th 158,
21 Cal. Rptr. 2d 245 (2nd Dist. 1993) 12

YMCA of Metro. L.A. v. Superior Court,
55 Cal. App. 4th 22,
63 Cal. Rptr. 2d 612 (2nd Dist. 1997) 11

Federal Statutes

9 U.S.C. §§ 1-16 ..... i, 2

9 U.S.C. § 2 ..... 2, 8

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1332(a) 6

OPINIONS BELOW

The January 29, 2010 opinion of the California Court of Appeal, First Appellate District, Division Three, is reported at 181 Cal. App. 4th 816, 104 Cal. Rptr. 3d 844 (2010). A copy is attached as Exhibit A in the petitioner's Appendix. The California Supreme Court denied petitioner's petition for review of the Court of Appeal's opinion on April 14, 2010, which is reported unofficially at 2010 Cal. LEXIS 3320 (Cal. Apr. 14, 2010). A copy is attached as Exhibit C in the petitioner's Appendix.

The unreported December 10, 2008 Order of the Superior Court of the State of California, County of San Francisco, denying petitioner's motion to dismiss or, in the alternative, to stay action and to compel arbitration is attached as Exhibit B in the petitioner's Appendix.

STATEMENT OF JURISDICTION

The California Supreme Court denied petitioner's petition for review of the judgment of the California Court of Appeal on April 14, 2010. (App. C at 22a). This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the underlying judgment of the California Court of Appeal on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

(Federal Arbitration Act, 9 U.S.C. §§ 1-16)

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

1. The Case Below

The petitioner Geographic Expeditions, Inc. (GeoEx) is a tour operator specializing in adventure and cultural travel to destinations throughout the world. For one of its tours, GeoEx offered a hiking trek to the summit of Mount Kilimanjaro in Tanzania, called "The Real Kilimanjaro" trip.

The decedent, Jason Lhotka, and his mother, Sandra Menefee, were participants on this trek, with scheduled travel dates of September 22, 2007 through October 8, 2007. On or about October 4, 2007, Jason Lhotka, then

age 37, died, according to respondents, as a result of complications suffered during his climb. Respondents seek damages from GeoEx under various theories of liability.

At least four months prior to the September 22, 2007 departure date of the Real Kilimanjaro trip, GeoEx mailed tour participants a pre-departure packet of materials. These materials included, *inter alia*, a trip participant contract and a cover letter signed by GeoEx's president, James Sano. The cover letter stated in part:

> [O]ur lawyers, insurance carriers and medical consultants give us no discretion. A signed, unmodified release form is required before any traveler may join one of our trips.
>
> . . . My review of other travel companies' release forms suggests that our forms are not a whole lot different from theirs. In the end, I would strongly suggest you choose a company and the trip, not the forms. . . .

(App. A at 3a-4a).

The terms of the trip participant contract, which was separately signed by both Lhotka and Menefee (App. A at 2a), included, *inter alia*, a provision for binding arbitration before the American Arbitration Association in San Francisco, California. (App. A at 3a). Specifically, the contract provided as follows:

> I understand that all Trip Applications are subject to acceptance by GeoEx in San

> Francisco, California, USA. I agree that in the unlikely event a dispute of any kind arises between me and GeoEx, the following conditions will apply: (a) the dispute will be submitted to a neutral third-party mediator in San Francisco, California, with both parties splitting equally the costs of such mediator. If the dispute cannot be resolved through mediation, then (b) the dispute will be submitted for binding arbitration to the American Arbitration Association in San Francisco, California; (c) the dispute will be governed by California law; and (d) the maximum amount of recovery to which I will be entitled under any and all circumstances will be the sum of the land and air cost of my trip with GeoEx. I agree that this is a fair and reasonable limitation on the damages, of any sort whatsoever, that I may suffer.

(App. A at 3a).

On July 25, 2008, respondents filed their First Amended Complaint in the Superior Court of the State of California, San Francisco County. On September 15, 2008, GeoEx moved the trial court, under the FAA (App. B at 18a), to dismiss the case on the basis of the parties' written agreement to arbitrate, or in the alternative, to stay the action and to compel respondents to arbitrate.

By Order dated December 10, 2008, the trial court denied GeoEx's motion under the FAA, holding that the parties' agreement to arbitrate was both procedurally and substantively unconscionable under *Armendariz v.*

Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745 (2000). (App. B at 18a-19a). As to the procedural unconscionability aspect of its decision, the trial court held:

> The Sano letter establishes that the agreement was presented as a Take It Or Leave It proposition and was also represented to be consistent with industry practice. As a consequence, if the plaintiff and defendant wished to go on this trip, they could do so only on these terms.

(App B at 18a). GeoEx timely appealed from the trial court's order to the California Court of Appeal, First Appellate District.

By Order dated January 29, 2010, the Court of Appeal, First Appellate District, affirmed the trial court's order denying GeoEx's motion to compel arbitration. Conceding that both procedural and substantive unconscionability must be present in some degree, the Court of Appeal determined that the parties' agreement to arbitrate was both procedurally and substantively unconscionable. (App. A at 6a-15a). Its finding of procedural unconscionability was based entirely upon Mr. Sano's letter advising the respondents (and all other prospective trip participants) that the terms of the trip participant contract were not negotiable and were no different from other tour operators' contracts, thus leaving the respondents with a lack of "meaningful choice." (App. A at 7a-12a).

On March 10, 2010, GeoEx filed a petition for review of the Court of Appeal's decision with respect to its finding of procedural unconscionability with the California Supreme Court, specifically arguing that the Court of Appeal decision violated the mandates of the FAA, by holding arbitration provisions in recreational contracts to a different unconscionability standard than other terms in recreational contracts. This petition was denied *en banc* by the California Supreme Court on April 14, 2010. (App. C at 22a).

2. Parallel Litigation in Federal Court

On October 6, 2008 – subsequent to the respondents' filing of their First Amended Complaint in the California Superior Court, but well before the December 8, 2008 decision on petitioner's state court motion to dismiss or stay – the petitioner filed, under the FAA, a motion to stay the state court action and to compel arbitration with the United States District Court for the Northern District of California.

On December 29, 2008, the district court denied petitioner's motion on jurisdictional grounds, determining that the amount in controversy did not meet the jurisdictional threshold of 28 U.S.C. § 1332(a) because of the contractual provision which limited damages to the sum of the land and air cost of the GeoEx trip. *Geographic Expeditions, Inc. v. Estate of Lhotka*, No. C 08-04624 SI, 2008 U.S. Dist. LEXIS 105691 (N.D. Cal. Dec. 29, 2008). GeoEx appealed that decision to the United States Court of Appeals for the Ninth Circuit, and on March 31, 2010, the Ninth Circuit reversed and remanded. *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102 (9th Cir. 2010).

The matter has since returned to the district court for a substantive determination on GeoEx's October 2008 petition to compel arbitration and to stay the state court action. The next hearing is presently scheduled for August 13, 2010 on GeoEx's renewed motion and respondents' motion for judgment on the pleadings based upon principles of collateral estoppel.

REASONS FOR GRANTING THE PETITION

The FAA creates "a body of federal substantive law of arbitrability" and represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The legislative history of the FAA makes clear that Congress intended "a broad reach of the Act, unencumbered by state-law restraints." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

The decision of the California Court of Appeal has ignored the mandates of the FAA in two important respects.[1] First, the Court of Appeal, in denying the

---

1. It is unfair and detrimental to the jurisdiction of the federal courts that the improper jurisdictional determination by the district court, and the delays associated with the successful appeal of same, would result in the state court action proceeding to final judgment, thereby depriving federal courts of the statutory jurisdiction vested in them under the FAA to enforce arbitration agreements involving interstate commerce. By granting this Petition, this Court would re-assert proper federal jurisdiction over this FAA matter and possibly avoid further litigation and appeals from whatever determination is ultimately made by the Northern District of California in that proceeding.

enforceability of the arbitration provision at issue, held said provision to a different unconscionability analysis than that used by California courts in determining the enforceability of other provisions in consumer recreational contracts. Second, in making this determination, the California Court of Appeal relied on facts related to the enforceability of the contract as a whole, as opposed to the enforceability of the arbitration clause itself and failed to allow the arbitrator to determine the enforceability of the agreement as a whole, again in violation of the FAA as interpreted by this Court.[2]

1. The Court of Appeal treated an arbitration provision in a recreational contract differently than California law treats other provisions in recreational contracts, thereby violating the mandate of the FAA.

Section 2 of the FAA provides that arbitration agreements shall be valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

---

2. Respondents have asserted that the California Supreme Court's denial of GeoEx's petition for review collaterally estops any future action by the Northern District of California in enforcing the arbitration provision under the mandates of the FAA. But as stated by Justice Ginsburg in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 n.7 (2005), a state court controversy "remains alive" during the pendency of a petition for writ of certiorari before this Court. Because the state court action relates to different, albeit related, legal issues from those at issue in the federal action, petitioner respectfully requests that this Court either grant this Petition or conclude that any denial of the Petition does not collaterally estop any action by the state court in connection with that pending action.

For several decades, this Court has consistently held that the FAA forbids arbitration clauses to be treated in a manner different from other contractual provisions. *E.g.*, *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___, No. 09-497, 2010 U.S. LEXIS 4981, at *8 (June 21, 2010) ("The FAA thereby places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms. . . .") (citations omitted); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2 . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts."); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.").

The California Court of Appeal's decision recognized that under California law, in order to invalidate a contract – or an arbitration clause therein – on the grounds of unconscionability, *both* procedural and substantive unconscionability must be demonstrated, using a "sliding scale" approach. (App. A at 6a). *See also Armendariz*, 24 Cal. 4th at 114, 99 Cal. Rptr. 2d at 767. "The procedural element requires oppression or surprise. . . . Oppression occurs where the contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. . . ." (App. A at 6a). *See also Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1071, 130 Cal. Rptr. 2d 892, 897-98 (2003); *Crippen*

v. Central Valley RV Outlet, Inc., 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189, 192-93 (2004) (*citing Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621, 55 Cal. Rptr. 2d 818, 824 (1996)).

In its decision, the California Court of Appeal held that the instant arbitration provision was both procedurally and substantively unconscionable. Specifically, the court concluded that procedural unconscionability was present because of the lack of market alternatives and the fact that the trip participant contract was "mandatory and unmodifiable." (App. A at 11a). The court made these determinations based solely upon the cover letter from Mr. Sano accompanying the trip participant contract, which required an unmodified release and which opined that other travel companies' terms and conditions "were no different." (App. A at 3a-4a, 7a).

Importantly, however, in the context of contracts for recreational or sporting activities, California courts have consistently ruled that there can be no "absence of meaningful choice," as consumers are always free to simply forgo the activity. Indeed, in numerous cases in California, the courts have rejected arguments alleging unconscionability in recreational contracts, holding that the plaintiff could simply forego the nonessential recreational activity. *E.g.*, *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1246, 60 Cal. Rptr. 3d 631, 650 (1st Dist. 2007) (holding that listening to music or FM radio is nonessential recreational activity that the blind plaintiff could simply have forgone if he disliked the requirement that he purchase the basic cable tier); *Olsen*, 48 Cal. App. 4th at 621-22, 55 Cal.

Rptr. 2d at 824 (holding that release in ski binding adjustment company contract was not unconscionable because skiing is a nonessential recreational activity); *Blue Booth v. Santa Barbara Biplane Tours, LLC*, 158 Cal. App. 4th 1173, 1179, 70 Cal. Rptr. 3d 660, 664-65 (2nd Dist. 2008) (enforcing aerial sightseeing tour release where there was "no authority that a recreational airplane ride is an essential service affecting the public interest"); *YMCA of Metro. L.A. v. Superior* Court, 55 Cal. App. 4th 22, 27-29, 63 Cal. Rptr. 2d 612, 615-16 (2nd Dist. 1997) (holding that the YMCA's simple recreational offerings of games, socializing, shopping, and eating lunch, were not so essential as to rob plaintiff of her free will in deciding whether to sign the release); *Madison v. Superior Court*, 203 Cal. App. 3d 589, 597-99, 250 Cal. Rptr. 299, 304-06 (2nd Dist. 1988) (upholding release where decedent drowned while participating in scuba diving course because "[decedent] certainly had the option of not taking the class. There was no practical necessity that he do so."); *Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 614, 246 Cal. Rptr. 310, 314 (2nd Dist. 1988) (rejecting plaintiff's contention that motorcycle park release was unconscionable where there was "no evidence plaintiff could not have ridden his motorcycle elsewhere without the constraints imposed upon him by defendants"); *Okura v. United States Cycling Federation*, 186 Cal. App. 3d 1462, 1468, 231 Cal. Rptr. 429, 432 (2nd Dist. 1986) (upholding exculpatory bike racing release because the services provided herein "can hardly be termed essential")[3]

3. In dozens of other cases, California courts reach the same conclusion. *See, e.g., Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 1377, 59 Cal. Rptr. 2d 813, 825 (4th Dist. 1996)

(Cont'd)

As evidenced by the plethora of authority cited above, under California law, there can be no procedural unconscionability (and thus no general finding of unconscionability) based on lack of meaningful choice in a typical consumer recreational contract. Here, however, the California Court of Appeal applied an unconscionability analysis to determine the efficacy of an arbitration clause in a recreational contract. By applying an unconscionability standard to an arbitration clause in a recreational contract, the court applied a different standard than that applied in connection with other provisions, such as general releases, found in recreational contracts.

(Cont'd)

(enforcing exculpatory skiing release and rejecting plaintiff's contention that release was unconscionable because "providing ski lessons is not a service of great importance to the public, and skiing is not a necessary or essential activity."); *Hulsey v. Elsinore Parachute Center*, 168 Cal. App. 3d 333, 342-43, 214 Cal. Rptr. 194, 199 (4th Dist. 1985) (upholding exculpatory skydiving release and rejecting plaintiff's contention that release was unconscionable; "[p]arachute jumping . . . is not an activity of great importance to the public and is a matter of necessity to no one. . . ."); *Platzer v. Mammoth Mountain Ski Area*, 104 Cal. App. 4th 1253, 1260, 128 Cal. Rptr. 2d 885, 889 (3rd Dist. 2002) (enforcing exculpatory skiing release and stating that "skiing, like other athletic or recreational pursuits, however beneficial, is not an essential activity") (citation omitted); *Randas v. YMCA of Metropolitan Los Angeles*, 17 Cal. App. 4th 158, 162, 21 Cal. Rptr. 2d 245, 247 (2nd Dist. 1993) (enforcing exculpatory swimming release and holding that "[s]wimming, like other athletic or recreational activities, however enjoyable or beneficial, is not 'essential' as a hospital is to a patient") (citation omitted).

Such a disparity is specifically prohibited by the FAA. *See Rent-A-Center*, *supra*, 2010 U.S. LEXIS 4981, at *8 ("The FAA thereby places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms. . . .") (citations omitted); *see also Securities Industries Assoc. v. Connelly*, 883 F.2d 1114, 1121 (1st Cir. 1989) ("the FAA ordains that the state's appulse toward arbitration agreements must be the same as its approach to contracts generally.").

The California Court of Appeal has acted contrary to the liberal federal policy favoring arbitration agreements found in *Moses H. Cone Mem. Hosp.* and its progeny. It has contravened both the language and spirit of the FAA. This Court should therefore grant this Petition to address and correct the court's error.

2. **The Court of Appeal violated the FAA by improperly failing to allow the arbitrator to determine the enforceability of the trip participant contract as a whole.**

As described above, the California Court of Appeal concluded that the arbitration clause at issue was unenforceable because it was both procedurally and substantively unconscionable. To reach this conclusion as to procedural unconscionability, the court relied solely on the cover letter from Mr. Sano accompanying the trip participant contract, which did not even specifically reference the arbitration provision. Rather, the letter merely discussed the trip participant contract as a whole. (App. A at 3a-4a). In so doing, the court made three errors: (1) it failed to segregate the validity of the arbitration clause from the validity of the contract as a

whole; (2) it improperly considered evidence outside of the arbitration clause itself to determine its enforceability; and, (3) it failed to allow the arbitrator to determine the enforceability of the entire trip participant contract.

In the recent case of *Rent-A-Center*, this Court re-affirmed the principle that an arbitration clause is severable from the contract as a whole. *Rent-A-Center, supra*, 2010 U.S. Dist. LEXIS 4981, at *13-*14 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. '[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'")). Thus, as long as an arbitration provision is enforceable, it should be upheld, as a separate issue from the validity of the remainder of the contract.

As mentioned above, Mr. Sano's cover letter to the trip participants made no mention of the arbitration provision; rather, it only discussed the contract as a whole. Whatever import the cover letter had with regard to the respondents' lack of meaningful choice in entering into the GeoEx contract, however, that import dealt with the contract as a whole, not the arbitration provision itself. *See, e.g., Rent-A-Center, supra*, 2010 U.S. LEXIS 4981, at *18-*19 (rejecting claims that a delegation provision in an arbitration contract was procedurally unconscionable because the employment agreement of which it was a part was alleged to be imposed as a non-negotiable condition of employment). Thus, the court

improperly considered evidence outside the scope of the arbitration provision, and used that evidence to invalidate the arbitration clause.

Moreover, by concluding that the arbitration clause of the contract was unconscionable and therefore unenforceable, the court failed to allow the arbitrator to determine the validity of the remainder of the contract, in violation of the FAA as interpreted by this Court:

> [I]f the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. . . . We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

Such a finding by the court was in error, as this question is *precisely* the type of issue that should have been left to the arbitrator to decide. In light of the above, the question of enforceability of the contract as a whole should have been left to the arbitrator.

CONCLUSION

The Court should grant this Petition to confirm the mandates of the FAA, which forbid arbitration clauses to be treated in a manner different from other contractual provisions, and which require issues pertaining to the enforceability of the contract as a whole, as opposed to the arbitration agreement, to be decided by the arbitrator rather than the courts.

Respectfully submitted,

RODNEY E. GOULD
Counsel of Record
RUBIN, HAY & GOULD, P.C.
205 Newbury Street
P.O. Box 786
Framingham, MA 07101
(508) 875-5222
rgould@rhglaw.com

J. RANDOLPH EVANS
SHARI L. KLEVENS
MCKENNA, LONG
& ALDRIDGE LLP
1900 K Street, NW
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner